SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 817

BENTLEY L. HOLT AND BONNIE J. HOLT, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The opinion of the Tax Court is reported in ~~44~~ T. C. 686. The Opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 364 Fed. 2nd 38 and is printed in Appendix A hereto, *infra*, pp. 11.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 1, 1966. ~~On October 27, 1966,~~ By order of Associate Justice Byron K. White, the Petitioners' time to file a petition for a writ of certiorari was extended to ~~No~~ December 2, ~~vember 30,~~ 1966. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

I. Whether income derived by an Indian from Tribal or Allotted and Restricted Lands held in trust by the United States is exempt from Federal Income Tax.

II. Whether livestock, other property, or money furnished to a Rehabilitation client of the Rehabilitation Program of the Cheyenne River Sioux Tribe (established pursuant to Section V of Public Law 776, 83rd Congress, 68 Stat. 1191) is impressed with a trust so that such property, and any increase thereof, is exempt from Federal Income Tax.

III. Whether an Indian lessee of land leased from the tribe in which he is an enrolled member is in fact a co-owner of such land, so that the income derived by such Indian from the leased land is exempt from Federal Income Tax.

STATUTES AND REVENUE RULINGS INVOLVED

The statutes involved are General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 et seq., Public Law 483, 83rd Congress, 68 Stat. 467-68; and Public Law 776, 83rd Congress, September 3, 1954, 68 Stat. 1191. The pertinent Revenue Rulings are printed in Appendix B, *infra*, pp. 17.

STATEMENT

Petitioner Bentley L. Holt and Bonnie J. Holt are husband and wife who resided on a ranch near Isabel, South Dakota, in the years 1956, 1957 and 1958. Since Petitioner Bonnie J. Holt is in this proceeding merely because she was on the joint return, and all issues herein involve the income of Petitioner Bentley L. Holt, hereafter the reference "Petitioner Holt" will refer only to Petitioner Bentley L. Holt.

Petitioner Holt is of Indian blood and descent, and a duly enrolled allotted and recognized member of the Cheyenne River Tribe of Sioux Indians in the State of South Dakota. He was born an affiliate of the Tribe, and has been allotted Allottee No. 3704 on the Cheyenne River Reservation, and is classified as a non-competent ward of the Federal Government.

During the periods here involved Petitioner Holt operated Range Unit No. 124, comprising 3,520 acres of land, under the Rehabilitation Program of the Cheyenne River

Sioux Tribe. Of this land, 320 acres were held by Petitioner Holt in fee simple and as to the taxability of the income apportionable to this land, there is no dispute. Of the remaining land, 1,440 acres was grant of exchange assignment land, which land was held in trust by the United States of America, and as to the taxability of the income apportionable to this land, there is no dispute either, the Respondent Commissioner of Internal Revenue having conceded upon the basis of Squire v. Capoeman, 351 U.S.1. (1956), that such income is not taxable.

The dispute arises with respect to the income derived by the Petitioner Holt from the remaining 1,760 acres of the Range Unit which land was leased by Petitioner Holt from the Cheyenne River Sioux Tribe of South Dakota, and which land is also held in trust by the United States of America. The income received by Petitioner Holt consisted of proceeds from the sale of and payment in kind of livestock, oil and gas leases, and from soil bank payments from the Agriculture Stabilization and Conservation Office.

In 1954, Congress passed Public Law 776, 68 Stat. 1191, et seq., which law was the end product of years of negotiations between the Tribe and the Government. Section V of this Act provided funds for the rehabilitation of members of the Cheyenne River Sioux Tribe. On February 6, 1956, the Commissioner of the Bureau of Indian Affairs, pursuant to authority delegated by the Act, approved the Tribe's Rehabilitation Plan.

One aspect of the Rehabilitation Plan was the "repayment cattle program". Under this program, land, bulls, yearling heifers, and production materials were furnished by the Tribe to its members interested in ranching, and they subsequently repaid the grants in the form of cattle and cash. Title to all cattle furnished to the member pursuant to the program remained in the Tribe until full payment therefor. The cattle could be sold only with the permission of the Tribe's governing body.

Pursuant to the Rehabilitation Plan, on September 24, 1956, Petitioner Holt and his wife, Bonnie, applied for a rehabilitation loan of $10,000. The application incorporated the program's terms previously mentioned. Petitioners concurrently executed a note for $10,000 payable to the governing body of the Tribe, the Tribal Council, and, to secure payment thereof, a mortgage on the 1,440 acres of allotted land. Finally, they executed an "Assignment of Trust Property and Power to Lease," providing in part:

> "In consideration of the granting of a loan to the undersigned under the terms of loan agreement No. 182, the undersigned hereby assigns to the lender as security for repayment of such loan, the following: (a) All property, except land, which is now or may in the future be held in trust for the undersigned by the United States; (b) all income from trust land in which the undersigned now has or income from any source and any funds from any source accruing to the individual Indian account of the undersigned. (Also) Any income received from lands held in trust by the United States Government or any income received from sale of personal property.
>
> The undersigned hereby grants to the superintendent of the agency under which the lender is operating, full right, power and authority to demand, collect, sue or receipt for any property and income of the undersigned, and to apply such income on the indebtedness of the undersigned to the lender. If payment is not made as set forth in the loan agreement of the undersigned, said superintendent or his authorized agent may take possession of any trust property or income of the undersigned, and dispose of the same in accordance with instructions of the Commissioner of Indian Affairs, and apply the proceeds on said indebtedness.

The loan application was approved on October 10, 1956, and the security agreement was approved on October 22 of that year. The proceeds of the loan were deposited in

a bank account maintained jointly by Petitioner Holt and the Tribe, and proceeds from the disposition of cattle were deposited in the account.

On December 1, 1956, Petitioner Holt obtained from the Tribe a "Grazing Permit" on "Range Unit No. 124". This unit included the 1,760 acres of tribal land. The permit, in part, provided:

> By authority of law and under the regulations (25 CFR 71) prescribed by the Secretary of the Interior, **Bentley L. Holt** * * * is hereby granted permission to hold and graze livestock on the foregoing range unit * * * for a period beginning **December 1, 1956,** and terminating not later than **November 30, 1959,** including all unreserved tribal land as authorized by the governing body of the said Tribe and all unfenced Indian allotments on which authority to grant grazing privileges have been obtained and Government-owned lands which are part of the unit * * *
>
> * * * * * * * *
>
> In consideration of the above privileges the permittee agrees to pay to the Superintendent for the use and benefit of the Indians entitled to occupy the lands above described, the sum of money found to be due from the permittee * * * and the permittee further agrees to pay the grazing fees annually in advance. * * *
>
> This permit shall not be assigned, sublet, or transferred without the written consent of the parties * * *

Petitioner Holt deposited with the superintendent an amount equal to one-half of the annual grazing fee as a penal bond "to guarantee full performance under the terms of the permit".

The Respondent Commissioner of Internal Revenue determined deficiencies in Petitioner Holt's income tax for the years 1956, 1957, and 1958, in the amounts of $630.01, $786.39, and $1,204.57, respectively. Subsequently, with the concessions by the Respondent with regard to the 1,440 acres of grant exchange assignment land, and other stipu-

lations between the parties, the deficiencies were reduced to $16.00, $119.00, and $484.22, respectively.

The years 1956 and 1957 were in one docket and the year 1958 in another docket. The cases were consolidated for trial. The only issue before the Court was whether income derived by a tribal Indian through his use of tribal lands held in trust by the United States of America is exempt from Federal income tax. The trial was held before Judge Morton P. Fisher at St. Paul, Minnesota, on June 4 and 5, 1964, and briefs were duly filed. Judge Fisher died on February 11, 1965, and the case, not having been disposed of, was reassigned to Judge C. Rogers Arundell on May 21, 1965, and notice was given to the parties that any request for rehearing or reargument must be presented within 30 days. No such requests were made and the case was taken under advisement by Judge Arundell.

On July 30, 1965, the Tax Court of the United States filed an opinion, 44 T. C. No. 64, holding that income derived by Petitioner Holt from the sale of cattle in 1958, raised on leased tribal lands, is not exempt from Federal income tax, distinguished Squire v. Capoeman, supra. On october 7, 1965, Decisions under Rule 50 of the Tax Court were entered.

Petitioners filed Petition for Review on January 6, 1966.

On appeal, the Court below on August 1, 1966, affirmed the Tax Court.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that income derived by an Indian from Tribal or Allotted and Restricted Lands Held in Trust by the United States is not exempt from Federal Income Tax.

2. In holding that livestock, other property, or money furnished to a Rehabilitation client of the Rehabilitation Program of the Cheyenne River Sioux Tribe (established pursuant to Section V of Public Law 776, 83rd Congress,

68 Stat. 1191) is not impressed with a trust and that such property, and any increase thereof is not exempt from Federal Income Tax.

3. In holding that an Indian lessee of land leased from the tribe in which he is an enrolled member is not in fact a co-owner of such land, and the income derived by such Indian from the leased land is not exempt from Federal Income Tax.

4. In affirming the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in keeping with the decision of this Court in Squire v. Horton Capoeman et us., 351 U.S. 1. The Court below has interpreted too narrowly the Capoeman decision and the exemptions granted in the General Allotment Act of 1887 (24 Stat. 388, 25 U.S.C. § 331 et seq.), and Public Law 483, 83rd Congress, 68 Stat. 467-68.

The Internal Revenue Service and the Court below interprets the phrase "allotted and restricted lands" to mean only those lands which an Indian holds either through original allotment or inheritance. Thus, they hold that the exemption from taxation does not apply to income from (1) Tribally owned land which an Indian has purchased or leased; (2) Allotted land which an Indian has purchased or leased; or (3) Allotted land which was acquired by gift or devise. Said land is held in trust and for the most part in accordance with Section 5 of the General Allotment Act of 1887 (25 U.S.C. 348). Such a narrow interpretation is not in keeping with the decision in Squire v. Horton Capoeman et us., *supra.*

The opinion in **Squire v. Horton Capoeman et ux.,** *supra,* is replete with expressions which speak against this narrow interpretation. The opinion explicitly recognizes the tax exemption as an attribute of the land itself, and not as an attribute to the ownership of the land by one particular Indian. At page 6, Chief Justice Warren, speak-

ing for the Court, in reference to the amendment to Section 6 of the General Allotment Act said:

> "The literal language of the proviso envinces a congressional intent to subject an Indian allotment to all taxes **only after a patent in fee is issued** to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted" (Emphasis supplied).

The Court at page 7 quotes with approval the statement of Felix S. Cohen, "an acknowledged expert in Indian law," that:

> "It is clear that the exemption accorded **tribal and restricted Indian lands** extends to the income derived directly therefrom" (Emphasis supplied).

At page 8 the Court in speaking of the allotment system said:

> "The purpose of the allotment system was to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic.' Board of Commissioners v. Seber, 318 U. S. 705, 715. **To this end, it is necessary to preserve the trust and income derived directly therefrom,** but it is not necessary to exempt reinvestment income from tax burdens. It is noteworthy that the superintendent case did not involve an attempt to tax the land 'surplus'" (Emphasis supplied).

The above quotations from the **Squire v. Horton Capoeman et ux.** opinion clearly evidence the Supreme Court's recognition of the tax exemption originating by virtue of the trust under which tribal and allotted and restricted Indian lands are held, and thus recognition that such tax exemption exists so long as such trust is not terminated by the issuance of a patent in fee to said lands. Therefore, whether such lands are operated by an Indian by reason of his purchase or lease of said lands, or by reason

of his having obtained such lands by gift or devise, the income directly derived therefrom is tax exempt.

It is essential that the Court review the decision of the Court of Appeals so that the decisions of this Court may be uniformly and correctly interpreted and implemented.

2. For the reasons presented in 1. above, Revenue Ruling 56–342, C.B. 1956–2, 20 as amplified by Revenue Ruling 62–16, is null, void, and of no effect. Thus, this Court should review the decision of the Court below, and these Revenue Rulings in order to insure that the legislative intent of the Congress is carried out.

3. By Section V of Public Law 776 (68 Stat. 1192) Congress intended to provide a means of rehabilitation to the Indians of the Cheyenne River Sioux Tribe of South Dakota. The Tribe implemented Section V by the adoption of a Rehabilitation Program which was approved by the Secretary of the Interior. If the decision of the Court below, and the aforesaid Revenue Rulings are allowed to stand, the Rehabilitation Program will provide little or no relief to those Indians that Congress intended to provide with a means of rehabilitation.

4. All of the property used in the Rehabilitation Program, including cattle, remains in the name of the Cheyenne River Sioux Tribe. As the Rehabilitation Program was established by Congress, the funds made available thereto, and everything purchased therewith are instrumentalities of the Federal Government, and thereby not subject to taxation. This has been so held by this Court in U. S. v. Rickert, 188 U.S. 432 (1903), and also in U. S. v. Dewey County (U.S.D.C.S.D., 1962), 14 F. 2d 784, Aff'd (C.A. 8, 1926), 26 F. 2d 434, with regard to state taxation. The philosophy behind the instrumentality doctrine is that any outside interference with an instrumentality of the government such as by taxation, would interfere with the rendition of a government function. Congress, in its wisdom, was aware of this doctrine when it promulgated Public Law 776. Congress was also aware that the nature of the Rehabilitation

Program, to be established was such that to succeed, it must not be interfered with by any government, by way of taxation. Congress was aware that a certain sum was necessary to carry out the plans and policies of the Rehabilitation Program, and did not intend the dilution of the funds appropriated for the purposes of carrying out the program by way of Federal income taxes.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 30, 1966

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 18,302.

Bentley L. Holt and Bonnie J. Holt,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

} Petition for Review of the Decision of the Tax Court of the United States.

[August 1, 1966.]

Before VAN OOSTERHOUT, BLACKMUN and GIBSON, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

The issue, apparently one of first impression, presented by the taxpayers' petition for review of the decision of the Tax Court, reported at 44 T.C. 686, is whether a non-competent Indian holding a grazing permit on tribal land is subject to federal income taxation upon profits allocable to such lands arising from a cattle operation financed under a statutory rehabilitaiton program for Indians. The Tax Court held such income to be taxable. We affirm.

The material facts are undisputed and are fully and fairly stated in the Tax Court opinion. The petitioners and Bentley L. Holt and Bonnie J. Holt, his wife. Mrs. Holt is involved only because she filed a joint tax return

with her husband. Mr. Holt will be referred to as taxpayer hereinafter.

The Tax Court determined deficiencies as follows: 1956, $16.00; 1957, $119.00; 1958, $484.22.

Taxpayer is a full-blooded Indian. He is a duly enrolled, allotted and recognized member of the Cheyenne River Tribe of Sioux Indians. He is classified in Indian terminology as a noncompetent ward of the federal government.

Taxpayer derived income from ranching and farming operations on 3,520 acres of land located on the Indian reservation, such land falling in three categories, to wit, (1) 320 acres held in fee simple; (2) 1440 acres specifically allotted to taxpayer pursuant to federal law and by tribal constitution; (3) 1760 acres of tribal land held in trust by the United States for the benefit of the tribe upon which taxpayer in the year in question held an authorized grazing permit for which he paid an agreed consideration.

The income allocable to the land in categories (1) and (2) above is not in dispute in this appeal. Taxpayer concedes liability and has paid income tax on profits derived from his fee title land. The Government conceded, upon the basis of *Squire v. Capoeman*, 351 U.S. 1, that income from the category (2), allotted land, is exempt from tax. The tax deficiencies here determined are based entirely upon the agreed profit derived from the category (3) land—the tribal land upon which taxpayer held a grazing permit.

Taxpayer urges that he is entitled to a reversal for the following reasons:

(1) Income derived by a qualified Indian from tribal lands is exempt.

(2) As a member of the tribe, he is a co-owner of the tribal land and is entitled to exemption from income derived therefrom.

(3) The livestock, other property, or money furnished to a rehabilitation client of the Rehabilitation Program of the Cheyenne River Sioux Tribe is impressed with the

trust and such property, and any increase thereof, is exempt from federal income tax.

Before discussing the specific points raised, we shall consider general principles applicable to all points. The general rule is that the reach of income tax statutes is broad; that exemptions from taxation are matters of legislative grace and that exemptions must be construed with restraint in light of the policy to tax income comprehensively. *Commissioner* v. *Jacobson*, 336 U.S. 28, 49; *United States* v. *Stewart*, 311 U.S. 60, 71; *Deputy* v. *du Pont*, 308 U.S. 488, 493; *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, 235.

Courts have recognized that treaties and statutes relating to the right of noncompetent Indians should be liberally construed in favor of Indians. *Squire* v. *Capoeman*, 351 U.S. 1, 6-7; *Carpenter* v. *Shaw*, 280 U.S. 363, 367. However, such principle comes into play only if such statute or treaty contains language which can reasonably be construed to confer income exemptions.

Blackbird v. *Commissioner*, 10 Cir., 38 F. 2d 976, supports taxpayer's position asserted here that the broad language of the income tax statutes does not reach Indians. In *Superintendent* v. *Commissioner*, 295 U.S. 418, the Supreme Court observes that *Blackbird* does not harmonize with the holding of *Choteau* v. *Burnet*, 283 U.S. 691, and holds that income on trust funds held by the United States for a noncompetent Indian are not exempt from income taxation. The Court holds:

> "The general terms of the taxing act include the income under consideration, and if exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs.
>
> * * * * * * * *
>
> "The taxpayer here is a citizen of the United States, and wardship with limited power over his property does not, without more, render him immune from the common burden." 295 U.S. 418, 420-21.

The holding in *Superintendent* v. *Commissioner* is quoted and approved in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 116.

Both parties place considerable reliance upon *Squire* v. *Capoeman*, supra. Since *Capoeman* involved only allotted lands, the Supreme Court did not have before it nor did it expressly decide the precise issue here raised. Isolated statements may be found in *Capoeman* favoring the contentions of each of the parties. The Court in *Capoeman* unequivocally states: "We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties of remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed." 351 U.S. 1, 6.

Consideration will now be directed to taxpayer's first and second points, which are closely related. It is quite true that *Capoeman* determined that income from allotted lands upon which patent had not issued is not subject to income tax. In that case, the land producing the income had been specifically allotted to the taxpayer. He had a definite interest in particular land. Upon the basis of such interest, he was entitled to a patent when determination of his competency was made. The land here involved which produced the income in controversy is tribal land. Tribal land is held in trust by the United States for the use of the tribe. No individual Indian has title or an enforceable right in tribal property. *Choate* v. *Trapp*, 224 U.S. 665, 671; *Cherokee Nation* v. *Journeycake*, 155 U.S. 196, 207; *Whitefoot* v. *United States*, Ct. Cl., 293 F.2d 658, 662; *Minnesota Chippewa Tribe* v. *United States*, Ct. Cl., F.2d 906, 913.

The constitution of the tribe, which is set out in the Tax Court opinion, confers no rights in tribal land upon individual tribe members. Leasing of such land is authorized. Any income derived from tribal land accrues for the benefit of the tribe as a whole.

The issue of whether profits derived by the tribe from tribal land are exempt from income taxation is not here

involved. The income in controversy here was that derived by the taxpayer as lessee or permittee under his grazing permit pertaining to tribal land which he obtained from the tribe. While Indians were granted priority on grazing permits, permits could be granted to non-Indians. Unquestionably, income derived from land held under a grazing permit by a non-Indian would be taxable.

In *Capoeman*, the Court determined that specific land was allotted to the taxpayer and found that under the General Allotment Act, the Secretary when satisfied the Indian allottee was competent was required to transfer the fee to the Indian "free of all charge or encumberance whatsoever." The Allotment Act also provides that after issuance of patent all restrictions as to sale, encumbrance or taxation shall be removed. The Court determined that the imposition of a tax on the gain realized from timber sold and removed from the allotted land would defeat the Government's undertaking in the Allotment Act to deliver the land to the allottee free and clear of encumbrance.

In our present case, no statute or treaty has been called to our attention or found which gives taxpayer any title or right to acquire title in tribal land nor are any such rights conferred upon the individual Indian by the tribal constitution.

The taxation of the taxpayer's individual profit derived from his lease of tribal land cannot possibly represent a burden or encumbrance upon the tribe's interest in such land. The holding of *Capoeman* and a fair reading of the opinion as a whole affords no basis for the income tax exemption of taxpayer's earnings from 1760 acres of leased tribal lands. See *Commissioner* v. *Walker*, 9 Cir., 326 F.2d 261, 264.

Finally, taxpayer contends that the income is exempt because it was derived from a rehabilitation program set up for members of taxpayer's tribe by Public Law 776, 83d Cong., 68 Stat. 1191. Such contention was properly rejected by the Tax Court for the reasons stated in its opinion.

Public Law 776 provides for compensation to Indians whose land has been taken for the Oahe Dam Reservoir. None of the taxpayer's land was taken for such a project. The Act in § V appropriates $5,160,000 for the complete rehabilitation of all members of the tribe including members such as the taxpayer who had not been directly damaged by the project. Pursuant to the Act, a detailed rehabilitation program to be administered by the tribal council was worked out, approved, and placed in effect. Included therein was a repayment cattle program under which taxpayer obtained a $10,000 loan. The profits here sought to be taxed arose out of taxpayer's cattle operation financed by the cattle loan. We have found no authority which holds that income derived by an Indian from funds borrowed under a rehabilitation program are exempt from income taxation. The statement from *Capoeman* heretofore quoted does cast some implication to the effect that matters governed by treaties or remedial legislation may not be subject to the general rule that Indians, like other citizens, are subject to payment of income taxes. However, this sentence must be read in context with the following sentence, reading, "We also agree that, to be valid, exemptions to tax laws should be clearly expressed," 351 U.S. 1, 6, and with the opinion as a whole.

Public Law 776 contains no express statement exempting income earned by members of the rehabilitation program from income taxation nor can such exemption be fairly implied. The program is designed to provide participants with sufficient capital to operate self-sustaining economic units. Interest is charged on the money loaned and repayment of the principal in installments is required. The fact that the taxpayer has made net income out of his operation in excess of his exemptions is indicative that the plan is fulfilling its purpose. We see nothing unreasonable about taxing profits in the normal way. No inconsistency with the purpose of the rehabilitation act is apparent from the taxation of such income. If the taxpayer had obtained his financing from a bank or other lending agency, there could

be no question about his taxability upon the income here in question.

We find no merit in taxpayer's contention that the retention of title to the financed cattle by the tribal council impresses income therefrom with a trust in the nature of a guardian-ward relationship. The title retained is in the tribe as administrator of the project and not the Government. Moreover, the title retention arrangements are in furtherance of ordinary and usual methods of providing security for loans. Under the agreement here involved, the taxpayer can obtain full and unrestricted title to the cattle at any time by payment in full of the loan.

United States v. *Rickert*, 18 U.S.; *Dewey County* v. *United States*, 8 Cir., 26 F.2d 434; and *Warren Trading Post Co.* v. *Arizona*, 380, U.S. 685, cited by the taxpayer, do not support his position. Such cases involve the right of states to tax property on Indian reservations. The basis of such decisions is thus stated in *Warren Trading Post Co.*, p. 691: "And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax."

There can be no question about the power of Congress to levy an income tax upon the income involved in this case. The broad sweep of the income tax statutes reaches such income. There is no treaty or statute expressly or impliedly exempting such income from taxation.

The decision of the Tax Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Rev. Rul. 56–342:

Income held in trust for or received by the patent holder which is directly derived from allotted and re-

stricted Indian lands while such lands are held by the United States, as trustees, in accordance with section 5 of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. 348, is exempt from Federal income tax. *Squire* v. *Horton Capoeman et ux.*, 351 U.S. 1. Ct.D. 1796, I.R.B. 1956-21, 15. Such exempt income includes rentals (including crop rentals), royalties, proceeds of sales of the natural resources of such land, and income from the sale of crops grown upon the land and from the use of the land for grazing purposes.

Rev. Rul. 62–16:

Revenue Ruling 56–342, C.B. 1956–2, 20, which is based upon the decision of the Supreme Court of the United States in *Squire* v. *Horton Capoeman et ux.*, 351 U.S. 1, Ct. D. 1796, C.B. 1956–1, 605, holds that income held in trust for or received by the patent holder which is derived directly from allotted and restricted Indian lands while such lands are held by the United States, as trustee, in accordance with section 5 of the General Allotment Act, 25 U.S.C. 348, as amended, is exempt from Federal income tax. In interpreting the *Capoeman* decision, that Ruling holds that such exempt income includes rentals (including crop rentals), royalties, proceeds of sale of the natural resources of such land, and income from the sale of crops grown upon the land and from the use of the land for grazing purposes.

Revenue Ruling 56–342 was amplified by Revenue Ruling 58–64, C.B. 1958–1, 12, which holds that the term "income from the use of the land for grazing purposes" in Revenue Ruling 56–342 does not refer to income received from the sale of cattle raised on the allotted lands.

The effect of Revenue Ruling 58–64 was to deny a tax exemption to Indians who raise cattle and other livestock on their own allotments, while Indians who lease their allotments were entitled to treat their grazing fees as exempt income under Revenue Ruling 56–342. Revenue Ruling 58–64 accordingly was modified by Revenue Ruling 60–377, C.B. 1960–2, 13, which allows an exemption for certain proceeds from the sale of livestock but only to the extent of an amount equivalent to the grazing fees that the holder of the trust allotment might have received had the land been leased for grazing purposes.

Upon further consideration and in view of the difficulties under the formula set forth in Revenue Ruling 60–377 in allocating the portion of livestock sales proceeds attributable to the land and the portion attributable to other factors, such as labor, the use of equipment, and the like, the determination has been made to treat the full sums received as "derived directly" from the lands within the meaning of Revenue Ruling 56–342, just as in similar circumstances, under that Ruling, proceeds from the sale of crops grown upon trust allotments are so treated.

Accordingly it is held that income held in trust for or received by an Indian from the sale or exchange of cattle and other livestock raised on his allotted and restricted Indian lands while such lands are held in trust for him by the United States, as trustee, in accordance with section 5 of the General Allotment Act is exempt from Federal income tax. Unless otherwise provided by law, the exemption described herein will not be applicable in these instances where the Indian has obtained his interest in the exempt lands through an arm's length purchase rather than, for example, through allotment, gift, devise, or inheritance.

Revenue Ruling 58–64, C.B. 1958–1, 12, and Revenue Ruling 60–377, C.B. 1960–2, 13, are hereby revoked, and Revenue Ruling 56–342, C.B. 1956–2, 20, is amplified.

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 1966, copies of the foregoing Petition For a Writ of Certiorari To the United States Court of Appeals For the Eighth Circuit were served by First class United States mail, postage prepaid. addressed to Honorable Ramsey Clark, Acting Attorney General, Department of Justice, Washington, D. C. 20530.

WILLIAM HOWARD PAYNE

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 817

BENTLEY L. HOLT AND BONNIE J. HOLT,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case presents the question whether a non-competent Indian is subject to federal income tax on the gains derived from the sale of cattle raised on tribal lands which had been leased to him under an Indian rehabilitation program.

Petitioner[1] is a full-blooded member of the Cheyenne River Tribe of the Sioux Indians, and is classified as a non-competent ward of the federal government. During 1958 he derived income from ranching and farming operations on 3,520 acres of land located

[1] Mrs. Holt, a non-Indian, is a party only because she filed a joint income tax return with her husband for the taxable year 1958; Mr. Holt will be referred to as petitioner.

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on the Indian reservation. This land fell into three categories: (1) 320 acres held by petitioner in fee simple; (2) 1,440 acres allotted to him by the Tribe; (3) 1,760 acres of tribal land leased to petitioner. (Pet. 12.)

Petitioner concedes that he is liable for income tax on the profits from the 320 acres held by him in fee simple; the government concedes that income from the 1,440 acres of allotted land is exempt from tax. The only dispute here concerns the income derived from operation of the 1,760 acres of tribal land leased to petitioner. (Pet. 12.)

Petitioner obtained the grazing permit over the 1,760 acres of tribal land in December, 1956, along with a rehabilitation loan of $10,000. This loan was made pursuant to the Tribe's Rehabilitation Plan[2] under which land, bulls, heifers, and production material were furnished by the tribe to interested members, with ultimate repayment in the form of cattle and cash. (Pet. 16, 3–5.)

In 1958 petitioner realized a $4,452 profit from cattle raised on this 1,760 acres of tribal land. The Tax Court held this income subject to federal taxation, and the court of appeals affirmed (Pet. 11–17).

1. The Internal Revenue Code taxes all income from whatever source derived. Internal Revenue Code of 1954, § 61(a). This Court has long held that the Indians are subject to the income tax unless a treaty or statute has "clearly expressed" an exemption for

[2] This plan was approved by the Commissioner of the Bureau of Indian Affairs on February 6, 1956, under authority delegated by the Act of September 3, 1954, c. 1260, 68 Stat. 1191.

some type of income. See *Squire* v. *Capoeman,* 351 U.S. 1, 6; see also *Superintendent* v. *Commissioner,* 295 U.S. 418, 419–420; *Choteau* v. *Burnet,* 283 U.S. 691, 693, 696; *Heiner* v. *Colonial Trust Co.,* 275 U.S. 232, 234–235.

No treaty or statute exempts from taxation the income derived from cattle operations on leased tribal land. The Act of March 2, 1889, c. 405, 25 Stat. 888, § 11 (App. *infra,* p. 7) is substantially the same in all material respects as § 5 of the General Allotment Act of 1887, which this Court considered in *Squire* v. *Capoeman, supra.* In that case, the Court observed that the statute guaranteed that lands allotted to the Indians and held in trust for them by the United States would eventually be delivered to them free and clear of all charges and encumbrances whatsoever. The Court construed this statute as exempting from taxation profits derived from land allotted to an Indian, so long as the land was held in trust for him by the United States.

In the instant case the United States has conceded that the income earned by petitioner on the 1,440 acres of land allotted to him and held in trust for him by the United States is exempt from taxation under *Squire* v. *Capoeman.* However, there is nothing in the statute to exempt income earned by petitioner on the 1,760 acres of land which he held under lease. The United States has made no guarantee to deliver the title of such lands to him free and clear of all charges and encumbrances. As to such lands, petitioner is no different than any other lessee of the tribal lands, Indian or non-Indian. This Court has long held that

an Indian's income is not tax-exempt merely because he is a ward of the United States and his income is held in trust for him. *Superintendent* v. *Commissioner, supra.*

Petitioner quotes (Pet. 8) from Cohen, *Handbook of Federal Indian Law* (1942), p. 265, to the effect that "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom." Of the three cases cited by Cohen to support the quoted statement (*id.*, fn. 98), two involved allotted lands and statutes similar to those in *Capoeman* exempting allotted lands from taxation until a patent in fee was issued.[3] The third case, *Blackbird* v. *Commissioner,* 38 F. 2d 976 (C.A. 10), has been disapproved by this Court in *Superintendent* v. *Commissioner, supra,* pp. 419–420, and in *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 116–117. This Court's citation of the Cohen quotation in *Squire* v. *Capoeman, supra,* p. 9, related only to the question of whether the income from allotted rather than tribal lands was tax exempt.

Moreover, even if the income from tribal land was tax exempt, petitioner would not prevail here. Such a rule would do no more than exempt the tribe from tax on the rental it received from petitioner under the lease and exempt the members of the tribe (including petitioner) from tax on their shares of the rental pay-

[3] See *United States* v. *Homeratha,* 40 F. 2d 305 (W.D. Okla.), appeal dismissed, 49 F. 2d 1086 (C.A. 10), and *Pitman* v. *Commissioner,* 64 F. 2d 740 (C.A. 10).

ments. But such a rule would not exempt from tax the net income earned by a lessee of tribal land, such as petitioner.

2. Nor are petitioner's profits from cattle operations on the leased land exempted from taxation because he obtained a loan in order to finance these operations. Contrary to petitioner's contention (Pet. 9), the Act of September 2, 1954, c. 1260, 68 Stat. 1191, § V (App. *infra*, pp. 7–8) grants no tax exemption for income derived from business operations financed by money borrowed under the rehabilitation program. If Congress had wished both to loan money to the Indians and to exempt from taxation the profits earned with the borrowed money, it could easily have said so. This Court has repeatedly refused to find an implied tax exemption for Indians and has long required a "clearly expressed" statutory exemption. See cases cited *supra*, p. 3.

3. There is no merit to petitioner's final contention (Pet. 9–10) that taxation of the income here in question would interfere with a federal instrumentality because the tribe holds title to the financed cattle. As the court of appeals noted (Pet. 17), title to the cattle is held by the tribe as security for the $10,000 loan to petitioner. Petitioner can obtain full and unrestricted title to the cattle at any time by repaying the loan. The two cases relied on by petitioner (Pet. 9) are completely inapposite.[4] As the court below recognized (Pet. 17), both involved the question

[4] *United States* v. *Rickert*, 188 U.S. 432; *United States* v. *Dewey County*, 14 F. 2d 784 (D. S.D.), affirmed, 26 F. 2d 434 (C.A. 8).

whether a State could tax property on an Indian reservation.

There is no conflict of decisions, and no other reason for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
ROBERT N. ANDERSON,
CAROLYN R. JUST,
Attorneys.

FEBRUARY 1967.

APPENDIX

Act of March 2, 1889, c. 405, 25 Stat. 888, 891:

> SEC. 11. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, and patents shall issue accordingly. * * *

Act of Setember 3, 1954, c. 1260, 68 Stat. 1191, 1192:

> SEC. V. In addition to the sum set out in section II hereof, the United States further agrees that it will appropriate and make available a further sum in the total amount of $5,160,000 which shall likewise be deposited in the Treasury of the United States to the credit of said Indian Tribe to draw interest on the principal thereof at the rate of 4 per centum per annum until expended for the purpose of complete rehabilitation for all members of said Tribe who are residents of the Cheyenne River Sioux Reservation at the time of the passage of this Act, whether or not residing within the taking area of the Oahe Project, and for relocating and reestablishing members of said Tribe

who reside upon such lands conveyed to the United States to the extent that the economic, social, religious, and community life of all said Indians shall be restored to a condition not less advantageous to said Indians than the condition that the said Indians now are in: *Provided,* That said fund provided for in this section shall be expended upon the order and direction of the Tribal Council of said Tribe, with the approval of the Secretary of the Interior, for the purposes set forth in this section: *Provided further,* That the authorization contained in section XVI hereof shall remain available for a period not to exceed ten years from the effective date of this Act.

U.S. GOVERNMENT PRINTING OFFICE: 1967